

Commercial Property Services, Inc. and Building Service Local 47 Cleaning Contractors Pension Plan and its Trustees and its Local 47 Welfare Fund No. 1 and its Trustees. Case 8-CA-20451

August 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

Exceptions filed to the judge's decision in this case present the issue of whether the Respondent violated the Act by refusing to allow trustees of certain benefit funds to audit Respondent's payroll records.¹ The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act by refusing to allow the Charging Parties (the Trustees) to conduct an audit of its payroll records to determine whether appropriate contributions had been made to a pension plan and welfare fund by the Respondent on behalf of its employees represented by Service, Hospital, Nursing Home and Public Employees Union, Local 47, Service Employees International Union, AFL-CIO (the Union) in three separate bargaining units.²

The judge found that the Trustees were acting as agents of the Union when the audit request was made, that the information sought was necessary and relevant to the Union's performance of its role as collective-bargaining representative, and that the Respondent's refusal to provide the Trustees with the requested information concerning contributions made on behalf of employees in all three bargaining units violated Section 8(a)(5) and (1) of the Act.

We agree with the judge that the Respondent's refusal to provide the Trustees with information concerning contributions made on behalf of unit employees covered by the Erievue agreement violated the Act, as alleged. We do not, however, agree with his finding that the Respondent's refusal to provide the Trustees with similar information under the Janitorial and Site agreements was also unlawful.

Contrary to the judge, we find that the Trustees were not agents of the Union and that the Respondent's refusal to grant the audit request was not a re-

fusal to provide relevant information requested by union agents. We initially observe that in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), the Court found that a trustee of funds, such as those involved here is not a representative of the employer within the meaning of Section 8(b)(1)(B) of the Act, of the party who appointed him. The Court's rationale for this conclusion was that when an individual acts in his capacity as trustee his obligations are fiduciary in nature and he is expected to safeguard the trust for the benefit of the beneficiaries. Thus, in the Court's view, an individual who acts in the capacity of a trustee functions as the spokesperson of the beneficiaries, not the appointing party.

Although we recognize that *Amax* was concerned with a different legal question, we believe that the Court's reasoning in that case provides guidance for deciding the broader agency issue presented here. We are not suggesting that an individual who serves as a trustee always acts in his capacity as trustee, and therefore can never serve as an agent for the union or the employer. See, e.g., *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929 (1984), see also *Griffith Co. v. NLRB*, 660 F.2d 406, 411 (9th Cir. 1981), cert. denied 457 U.S. 1105 (1982). We simply proceed from the premise that a trustee is not acting for the union or the employer unless contrary evidence shows otherwise.

The record in this case shows that the provisions of the Janitorial, Site, and Erievue agreements do not remove the discretion of the trustees to administer the funds solely for the benefit of the employees.³ In addition, there is no evidence that the trustees acted at the direction of the Union or in any capacity other than trustees. Specifically, in 1983 the Trustees filed suit in Federal district court, known as the Matonis suit, to recover delinquent contributions from the Respondent under the Janitorial agreement. The suit, which was still pending at the time of the hearing, sought an audit of the Respondent's records which included information concerning the Site and Erievue units as well as the Janitorial unit. By letter dated July 15, 1985, the Trustees requested an audit of the Respondent's payroll records for the period July 1, 1984, through June 30, 1985. The audit was commenced, but a dispute arose over whether it had been completed. By letter dated April 8, 1987, Melvin Schwarzwald, in his capacity as attorney for the Trustees, inquired whether the Respondent would submit to an audit covering a period of "at least through June 30, 1986 and preferably up to date." This letter, addressed to the attorney representing the Respondent in the Matonis suit, stated that this request was "in regard to the pending

¹On November 7, 1988, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

²The collective-bargaining agreements in these three units are commonly referred to respectively as the "Janitorial" agreement, the "Site" or "Downtown" agreement, and the "Erievue" agreement.

³The Site and Erievue agreements contain provisions concerning only the pension fund.

lawsuit brought by the Pension Plan and Welfare Fund.”

Given these circumstances, we find that the Trustees were not acting for the Union when they requested the 1987 audit. Accordingly, because neither the Union nor its agent requested the information, it follows that the General Counsel failed to prove that the Respondent’s refusal to allow the audit requested by the Trustees with respect to the Janitorial and Site agreements violated Section 8(a)(5) and (1) of the Act.

However, under a different rationale, we find that the refusal to permit the audit was a violation of Sections 8(a)(5) and 8(d) with respect to the unit covered by the Erieview agreement.

The Erieview agreement was entered into by the parties on December 20, 1985, and expired by its terms on January 15, 1989. Under that agreement, the Respondent was required, *inter alia*, to contribute to the Union’s pension plan on behalf of unit employees covered by the agreement, and to otherwise comply with all terms of the Pension Trust agreement.⁴ Thus, the Pension Trust agreement, and all terms contained therein, were incorporated by reference into, and became part of, the Erieview agreement. One of these terms was an auditing provision under which the Respondent agreed to permit Trustees to perform audits.⁵

On April 8, 1987, during the term of the agreement, the Trustees requested the Respondent to submit to an audit of its payroll records.⁶ The Respondent failed and refused to reply, and thus acted in derogation of the aforementioned provisions of the contract between Respondent and the Union. Accordingly, Respondent engaged in an unlawful midterm unilateral modification of that agreement, and violated Sections 8(a)(5) and 8(d) of the Act, as alleged in the complaint.

However, the Respondent’s refusal to comply with the Trustees’ request did not violate the Act with respect to the Janitorial and Site agreements. These agreements expired on April 30, 1984, and November 6, 1985, respectively, and were not renewed. Consequently, when the Trustees made their audit request on April 8, 1987, neither agreement was in effect. The

Respondent’s refusal to comply with the Trustees’ audit request therefore does not constitute an unlawful midterm modification of the expired contracts, and hence did not violate Sections 8(a)(5) and 8(d) of the Act, as alleged in the complaint.

We are mindful that an employer remains statutorily obligated to continue applying the terms and conditions of employment in an expired contract until a new agreement or a bargaining impasse is reached.⁷ A failure or refusal to adhere to such terms may render the employer liable under Section 8(a)(5) and (1) on the basis that the employer has unilaterally changed the employees’ terms and condition of employment without first having bargained to agreement or reached impasse with the union. In the instant case, the auditing provision of the contract was a term or condition of employment which could not be unilaterally changed even after the expiration of the contract. Hence, it could be argued that the failure to abide by the provision was a unilateral change proscribed by Section 8(a)(5). However, the General Counsel did not plead such an allegation. Although the complaint alleged that the Respondent had a *contractual* obligation to supply the information and that the failure to supply it violated Sections 8(a)(5) and 8(d), the General Counsel did not contend that the auditing clause, as a term or condition of employment, survived the expiration of the contract. Hence, the Respondent was not placed on notice that it should present defenses that might be available in response to such an allegation (e.g., impasse).

In view of the above, we shall not find a violation under a “unilateral change” theory. However, we note that, if the complaint had alleged that the Respondent unilaterally changed its employees’ terms and conditions of employment by refusing to submit to an audit request, without first reaching agreement or impasse with the Union, and if the issue had been fully litigated at a hearing, a finding of a violation may well have been warranted.

AMENDED CONCLUSION OF LAW

Substitute the following for paragraph 5:

“5. The Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (5) and 8(d) of the Act by refusing to allow, on proper request, an audit of its payroll records for the period July 1, 1985, through January 15, 1989, for the purpose of determining whether the Respondent has made appropriate contributions to the Union’s pension plan for the Respondent’s employees in unit C set out above.”

⁴Art. XIII of the Erieview agreement, the pension provision, states that “The Employer shall be bound by the Trust Document.”

⁵Par. B of a September 27, 1979 amendment to the Union’s pension plan provides that “For any period of time not already audited by the Trust Fund’s auditors, [the Trustees] shall be permitted to examine the Employer’s payroll records, journals, general ledgers, tax returns as they may apply to the payroll only, and any other business records required by the auditors to determine such Employer’s compliance with the coverage, reporting and contribution provisions of this Pension Plan.”

⁶We find no merit in the Respondent’s contention that the April 8, 1987 letter from the Trustees’ attorney to the Respondent constituted a mere inquiry, and not a request to audit its payroll records or for information. We agree, instead, with the judge that the April 8, 1987 letter amounted to a request to audit. We note in particular that the Respondent in its answer to the complaint admitted that “on or about April 8, 1987 the Charging Parties requested the Respondent to allow the Charging Parties to audit Respondent’s payroll records for the purpose of determining whether Respondent had made contributions to the Pension Plan and Welfare Fund No. 1.”

⁷*Quality Assured Products*, 297 NLRB No. 137 (Feb. 26, 1990)(not reported in Board volumes); *R.E.C. Corp.*, 296 NLRB 1293 (1989).

AMENDED REMEDY

Having found that the Respondent engaged in unfair labor practices within the meaning of Sections 8(a)(1), (5), and 8(d) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to furnish the Charging Parties the information requested on April 8, 1987, permitting the Charging Parties to audit the Respondent's payroll records for all of its regular employees employed as freight operators, janitors, day matrons, cleaners and dock attendants at Erieview Plaza Building, excluding any such employees working 15 hours or less per week, office employees, guards and supervisors as defined in the Act, and employees employed by the Respondent at any other building. We shall require that the Respondent, on request, permit such an audit of its payroll records for the period July 1, 1985, through January 15, 1989, for the purpose of determining whether the Respondent has made appropriate contributions to the Union's pension plan.

ORDER

The National Labor Relations Board orders that the Respondent, Commercial Property Services, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally modifying the terms of its Erieview agreement with Service, Hospital, Nursing Home and Public Employees Union, Local 47, by failing and refusing to adhere to provisions contained therein requiring that it provide the Trustees of the Union's pension plan with information concerning contributions it has made to the Union's pension plan on behalf of unit employees covered by the Erieview agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, allow the Trustees of the Union's pension plan to audit the payroll records of the Respondent's employees covered by the Erieview agreement for the period July 1, 1985, through January 15, 1989, for the purpose of determining whether the Respondent has made appropriate contributions to the Union's pension plan as required under that agreement.

(b) Post at its Cleveland, Ohio place of business copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Re-

gional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally modify the terms of our Erieview agreement with Service, Hospital, Nursing Home and Public Employees Union, Local 47, by failing or refusing to adhere to provisions contained therein requiring us to provide the Trustees of the Union's pension plan, at their request, with information concerning contributions we have made to the Union's pension plan on behalf of our employees covered by the Erieview agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL allow the Trustees of the Union's pension plan, on request, to audit the payroll records of our employees who are covered by the Erieview agreement for the period July 1, 1985, through January 15, 1989, for the purpose of determining whether we have made appropriate contributions on their behalf to the Union's pension plan as required under that agreement.

COMMERCIAL PROPERTY SERVICES, INC.

Nancy Recko, Esq., for the General Counsel.

James P. Wilkens, Esq., of Akron, Ohio, for the Respondent.

Mary Balazs, Esq., of Cleveland, Ohio, for the Respondent.

⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

David M. Fusco and Melvin Schwarzwald, Esqs., of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On October 7, 1987, the Building Service Local 47 Cleaning Contractors Pension Plan and its Trustees and Local 47 Welfare Fund No. 1 and its Trustees (Charging Parties) filed an unfair labor practice charge against Commercial Property Services, Inc. (Respondent or CPS) alleging that CPS violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by failing to permit auditors retained by the Charging Parties to audit CPS' payroll records. The Regional Director for Region 8 issued his complaint and notice of hearing on November 20, 1987, to which CPS timely answered. Hearing was held on this matter on May 3, 1988, in Cleveland, Ohio. Briefs were received from the parties subsequently.

Based on the entire record and on my observation of the demeanor of the witnesses and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation with an office and place of business in Cleveland, Ohio, has at all times material, been engaged in the performance of janitorial and maintenance services for various buildings. Respondent admits the jurisdictional allegations of the complaint and I find that the Respondent is now, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that Service, Hospital, Nursing Home and Public Employees Union, Local 47, Service Employees International Union, AFL-CIO (Union) is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act. The complaint allegations that the Charging Parties have been agents of the above Union within the meaning of Section 2(5) of the Act is denied by Respondent and is one of the issues in this matter.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Statement of the Issues Presented for Determination

1. Whether the Union has been the designated exclusive bargaining representative and recognized as such by Respondent for employees in the units described as "Unit A" and "Unit B"¹ in paragraph 5 of the complaint, and whether this unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. Whether the Charging Parties are agents of the Union within the meaning of Section 2(13) of the Act.

¹ At all times since May 1, 1981, for unit A and November 1982 for unit B.

3. Whether the Charging Parties' assertion of their contractual right and request to audit Respondent's payroll records for the purpose of determining whether Respondent has made appropriate contributions to the Union's Pension Plan and Welfare Fund No. 1, is necessary for, and relevant to, the Union's performance of its functions as the exclusive collective-bargaining representative of the units.

4. Whether Respondent's refusal to permit the Charging Parties to conduct an audit of its payroll records for the purpose of determining whether Respondent has made appropriate contributions to the Union's Pension Plan and Welfare Fund No. 1 constitutes a violation of Section 8(a)(5) and (1) of the Act.

(a) Whether the Charging Parties' April 8, 1987 letter constitutes a request for information that gives rise to an 8(a)(5) duty to respond.

(b) Whether the unfair labor practice filed on October 7, 1987, was timely under Section 10(b) of the Act.

(c) Whether, by virtue of executing a settlement agreement with Respondent in March 1987, the Union has waived its right or is otherwise estopped from asserting the right to compel Respondent to submit to an audit.

(d) Assuming the Charging Parties acted as agents of the Union, whether the audit sought by the Charging Parties is in any way relevant to Local 47's role as the exclusive collective-bargaining representative for Respondent's employees in units A and B.

B. Background Facts

The Respondent is an Ohio corporation with an office and place of business in Cleveland, Ohio, where it has been engaged in the performance of janitorial and maintenance services for commercial, institutional, and rental buildings. Respondent has operations throughout Ohio and at various locations around the country, including Cleveland, Akron, Cincinnati, and Dayton, Ohio; Syracuse, New York; Louisville, Kentucky; and Denver, Colorado Springs, and Pueblo, Colorado. In the greater Cleveland/Akron area, approximately 180 of CPS' current janitorial employees are arguably represented by the Union. Approximately 80 to 90 others are represented by Hotel, Restaurant, Bar and Service Workers Employees Union Local 10. In Syracuse, CPS' employees are represented by SEIU Local 200, and in Denver, they are represented by SEIU Local 105. In all other cities where Respondent does business and in certain locations in Cleveland, CPS' janitorial employees are not represented by any labor organization. CPS has two affiliated companies in the janitorial and maintenance industry that operate on a nonunion basis, Cleveland Cleaning and Maintenance and GMI building services.

For some years, Respondent has had a collective-bargaining relationship with the Union. The Union has represented employees of the Respondent employed at various locations. The Union and the Respondent have entered into a number of collective-bargaining agreements covering Respondent's employees at various locations.

One such collective-bargaining agreement covered employees described as "Unit A" in the complaint. That contract is commonly referred to as the "Janitorial Agreement." The most recent of such agreements was effective by its terms from May 1, 1981, through April 1, 1984. Michael Murphy, who currently serves as secretary-treasurer and business

agent for the Union and as trustee for both Charging Parties, testified that the janitorial agreement covered employees at various sites. While the parties were involved in negotiations for a new janitorial agreement the Respondent provided the Union with a list of locations covered by the agreement. With respect to this list, CPS offered testimony that by 1987, it has lost through competitive bidding most of the major accounts previously covered under the janitorial agreement. Approximately 50 percent of the total number of employees previously covered under the janitorial agreement when that agreement expired in 1984 were no longer working for Respondent by 1987.

Pursuant to the terms of the janitorial agreement, Respondent participated in both Local 47 Welfare Fund No. 1 (welfare fund), and Building Service Local 47 Cleaning Contractors Pension Plan (pension plan).

While the parties did engage in negotiations towards a successor agreement, no such agreement was ever reached. Respondent asserts that the parties were unable to reach agreement on new janitorial agreement primarily due to an ongoing dispute between the Union and Respondent concerning the scope of the unit covered by the Agreement. Specifically, CPS opposed the Union's insistence on the continued inclusion of article XXI, which provided in relevant part:

This Agreement hereby covers as an Employer subject to the full terms of this Agreement any individual proprietorship, partnership, corporation firm, or any other entity which is engaged in janitorial work and is in any way a subsidiary or related entity to any Employer covered by this Agreement. Specifically and without limitation, this Agreement hereby includes any entity engaged in janitorial work which is operated in whole or in part by any officer, director, or any person employed by any Employer covered by this Agreement and further includes any entity engaged in janitorial work in which any investor in any Employer covered by this Agreement has any interest of any kind.

In Respondent's view, insistence on this language was unlawful because it would have required CPS to extend recognition to the Union with respect to nonunion entities operating in Cleveland based solely on some remote relationship to CPS and its officer and directors. The Union attempted to enforce article XXI in 1982 by suing both CPS and Cleveland Cleaning Maintenance in Federal district court seeking, in effect, to bind Cleveland Cleaning and Maintenance to the janitorial agreement.

CPS filed an unfair labor practice charge with the Board on November 16, 1984, alleging that the above quoted portions of article XXI was illegal, and the Union's insistence on it violated the Act. Complaint issued; however, the Board proceeding was dismissed pursuant to the parties' March 1987 settlement agreement, but no successor janitorial agreement was ever agreed to between the parties. Subsequent to the failure of negotiations, Respondent implemented a series of changes or modifications to the expired agreement. The Union was informed of these changes by letters from various agents of the Respondent. The letters which are pertinent to the instant matter modified the Respondents' obligation to make contributions to the welfare and pension funds.

By letter dated May 14, 1984, Respondent informed the Union that it would make no pension contributions for new employees at new accounts and would contribute \$0.10 per hour to the Welfare fund only for employees working at accounts within Cuyahoga County. The letter further informed the Union that no contributions would be paid to the welfare fund or the pension fund for employees servicing accounts in Summit County or Portage County or any other county other than Cuyahoga and Lorain Counties.

By letter dated November 29, 1985, the Union was informed that effective January 1, 1986, Respondent would no longer contribute to the welfare fund. To date Respondent continues to participate in the pension fund. The parties also entered into a supplemental agreement in relation to sites covered by the janitorial agreement.

The Union and the Respondent have been signatory to a series of agreements covering employees listed as "Unit B" in the complaint, the most recent of which was effective by its terms from November 7, 1982, through November 6, 1985. The date of execution of the agreement is March 27, 1987. The contract as signed on that date as a result of the settlement of a series of disputes between the parties and was the end result of lengthy settlement discussions. The contract is commonly referred to as the "Site Agreement" or "Downtown Agreement."

Pursuant to the terms of the site agreement, Respondent has participated in the pension fund and continues to do so for the employees employed at the remaining location, 3101 Euclid, Cleveland. Under this agreement, the Respondent was never obligated to make any contributions to the welfare fund. By letter dated August 7, 1985, Respondent terminated the site agreement effective November 6, 1985, and the Union sent Respondent a similar letter dated August 21, 1985.

Finally, the parties have entered into a separate collective-bargaining agreement for Respondent's employees working at the Erieview Plaza Building downtown Cleveland. This represents the parties' first contract at that site and is effective by its terms from December 20, 1985, through January 15, 1989. Pursuant to the provisions of the Erieview agreement, Respondent participates in the Union's pension fund.

As will be discussed in more detail, the Trustees of both funds are charged with the responsibility of ensuring that employers who participate in the funds are in compliance with their obligations as set forth in various collective-bargaining agreements. Trustees of the funds derive their power to act from trust documents in the collective-bargaining agreements. Murphy testified that the Union negotiates provisions of the collective-bargaining agreements which require an employer to contribute to the funds. Administration of the funds is delegated to the Trustees.

The collective-bargaining agreements at issue, as well as the trust instruments, permit the Trustees to conduct audits of Respondent's payroll records to determine whether Respondent has fulfilled its responsibilities as outlined in the collective-bargaining agreements. Such audits have, in fact, been conducted in the past.

In May 1980, the Charging Parties sued CPS in Federal district court seeking to recover allegedly delinquent contributions for the years 1975 through 1977 and the period from January 1 through June 30, 1979. The 1980 dispute over allegedly delinquent contributions and the Charging Par-

ties' right to conduct an audit arose primarily because Respondent objected to the request for audit 4 years after contributions were made. Because of the nature of its business and the big turnover in employees, CPS insisted that audits be conducted in a more timely fashion in order to minimize auditing mistakes.

When the Federal court litigation was resolved in June 1980, it was agreed between CPS and the Charging Parties that CPS would permit an audit, but that it would not be assessed any penalties for any deficiencies dating back to the years 1975 through 1977. It was also agreed that the audit would be completed within 90 days of execution of the settlement agreement. The settlement agreement also contained a provision requiring that future audits of CPS by the Charging Parties "shall be conducted expeditiously." CPS contends that it understood "expeditiously" to mean within 90 days after the June 30 end of its fiscal year.

Twice in 1983, the Charging Parties requested and CPS refused to permit an audit of its business records. Consequently, the Charging Parties brought suit against CPS in Federal district court (the "Matonis suit") seeking to recover allegedly delinquent contributions owed pursuant to the janitorial agreement. The Matonis suit also sought to compel CPS to submit to an audit of its business records. This law suit is still pending in Federal district court.

By letter dated July 15, 1985, the Charging Parties requested an audit of CPS' payroll records to ascertain whether CPS had made appropriate contributions for the period July 1, 1984, through June 30, 1985. Though that audit was commenced, the parties disagree as to whether it was completed. In Respondent's view the auditors had done all they needed to do to ascertain CPS' compliance with its contractual commitments. The auditors had a different view due to a long-standing dispute as to the scope of bargaining unit represented by the Union.

On April 8, 1987, the Charging Parties, purportedly acting as agents of the Union, requested Respondent to allow them to audit Respondent's payroll records for the purpose of determining whether Respondent had made appropriate contributions to the Union's welfare and pension funds. Respondent, to date, has refused to permit the Charging Parties to perform the requested audit. General Counsel contends that Respondent's failure to permit the Charging Parties to have access to its payroll records constitutes a violation of Section 8(a)(1) and (5) of the Act as the requested information is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of employees of Respondent.

C. Representative Status of the Union with Respect to and the Appropriateness of "Units A and B"

1. "Unit A"

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees, subject to the provisions of Section 9(a). One of the provisos of Section 9(a) is that the exclusive representative for purposes of collective bargaining must represent a majority of the employees "in a unit appropriate for such purposes."

General Counsel contends that the Union has, since at least May 1, 1981, been the designated exclusive collective-

bargaining representative of employees in "Unit A," that "Unit A" is an appropriate unit, and that since the date has been recognized as such by Respondent. Such recognition has been embodied in a series of collective-bargaining agreements, the most recent of which was effective from May 1, 1981, through April 30, 1984. Further, since at least May 1, 1981, the Union, by virtue of Section 9(a) has been, and is, the exclusive collective-bargaining representative of employees in an appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Murphy testified that the Union and the Respondent have been parties to at least three 3-year agreements covering the employees of Respondent in the unit described in the complaint as "Unit A." This unit description is as follows:

All of Respondent's employees engaged in janitorial work at sites not covered by site agreements, excluding any such employees working fifteen hours or less in an account where only one employee is engaged, if such account is not owned or operated by an entity which operates in more than one location serviced by the employer, excluding also office clerical employees and supervisors as defined in the Act.

Respondent contends that the above-described unit is no one appropriate for collective-bargaining stressing that it has no apparent geographic limitations and could conceivably cover all of its employees nationwide. It further contends that the General Counsel failed to meet her burden of proof by adducing evidence to support this broad unit or even any portion of it, noting that no evidence was offered that the Union was ever certified as the collective-bargaining representative for "Unit A" and no evidence was offered on common management, common supervision, employee interchange, similarity in wages, hours or working condition, or evidence of any other criteria recognized by the Board as being significant in determining the appropriateness of a bargaining unit.

I disagree with Respondent's contentions in this regard. General Counsel has shown that the Union has represented CPS' janitorial and cleaning employees throughout the course of all three janitorial agreements. The unit description is taken from the most recent collective bargaining agreement between the parties. There is no evidence that the unit has ever been comprised of other classifications of employees nor is there any evidence that classifications of employees have been improperly excluded from the unit. The parties have a substantial bargaining history involving employees in this kind of unit. In determining appropriate bargaining units, the Board has long given substantial weight to prior bargaining history. The Board is reluctant to disturb units established by collective bargaining as long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. See *Buffalo Broadcasting Co.*, 242 NLRB 1105 (1979); *Great Atlantic & Pacific Tea Co.*, 153 NLRB 154 (1965). The Board has also held that bargaining history may be determinative on the issue of the appropriateness of a bargaining unit because it is the only evidence adduced regarding the unit issue. *Puerto Rico Marine Management*, 242 NLRB 181 (1979).

Further, the parties have apparently limited the geographic scope of the unit by means of lists of jobs covered. Such a list was introduced into the record by Murphy. Murphy testified that many of sites involved at the time the contract expired are still serviced by Respondent's employees at this time. These sites are G.G. Nela Park, Austin Company, Cuyahoga County Libraries, Rockside Plaza, Huntington Banks and Severance. While Respondent has lost some of the accounts covered by the janitorial agreement, the Respondent has never notified the Union that it was withdrawing recognition from it as the exclusive collective-bargaining representative of employees in "Unit A" for that or any other reason.

Indeed, the evidence establishes that Respondent continues to recognize the Union as the exclusive collective-bargaining representative of employees in "Unit A" and continues to deal with it as such. As noted above, the parties were not able to reach a successor agreement to the one ending in 1984. However, subsequent to the failure of negotiations, Respondent implemented a series of changes or modifications to that agreement. Respondent informed the Union, by letter, of its intent to modify the contract in certain respects. The letters began in 1984 and continued through late 1985. Further, in or about June 1987 Respondent sent the Union a copy of an "Employee Disciplinary Notice" involving an employee who worked for respondent at the Chagrin Falls Huntington Bank. That is one of the sites covered by the janitorial agreement. In or about April 4, 1988, Respondent sent the Union a copy of such a notice involving an employee employed by Respondent at the Maple Heights County Library, also a site covered by the janitorial agreement. On April 5, 1988, Murphy wrote to the Respondent informing it that the subject employee had filed a grievance and asking for a meeting with regard thereto. Murphy testified that he met with representatives of Respondent in mid-to-late April 1988 to discuss the merits of the grievance. Respondent continues to participate in the pension fund with regard to "Unit A" employees.

On this issue, for all the reasons set forth above, I find that the Union has been, and is, the exclusive collective-bargaining representative of employees in "Unit A" which is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that Respondent has and continues to recognize it as such.

2. "Unit B"

General Counsel contends that the Union has, since at last November 7, 1982, been the designated exclusive collective-bargaining representative of employees in "Unit B," an appropriate unit, and since that date has been recognized as such by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective, by its terms from November 7 1982, through November 6, 1985. Further, since at least November 7, 1982, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive collective-bargaining representative of employees in an appropriate unit for the purposes of collective bargaining.

As discussed earlier, the parties have entered into series of agreements covering employees in unit B. Those agreements are commonly referred to as the site agreements. The unit description is taken from the most recent collective-bargaining agreement between the parties and reads as follows:

All of Respondent's regular employees engaged in janitorial work at the Ohio Savings Plaza, Penton Plaza, Caxton, 3101 Euclid, One Playhouse, and 666 Euclid Buildings in Cleveland, Ohio, excluding any such employees working fifteen hours or less in an account where only one employee is engaged, office employees and supervisors as defined in the Act.

There is no evidence that the unit has ever been comprised of other classifications of employees nor is there any evidence that any classifications of employees has ever been improperly excluded from the unit. The date of execution of the contract is March 27, 1987. This contract was signed as a result of the settlement of a number of disputes which existed between the parties. It is clear, therefore, that as of March 27, 1987, the Respondent still recognized the Union as the exclusive collective-bargaining representative of employees in "Unit B."

The record establishes that, at the present time, the only site listed in the unit description which is still serviced by employees in "Unit B" is the 3101 Euclid site. The Respondent has never withdrawn recognition from the Union on that, or any other basis. For all the reasons I found "Unit A" appropriate, I also find "Unit B" appropriate. Moreover as the request to audit extends back in time, most or all of the sites listed in the unit description would be involved. Respondent continues to participate in the union pension plan, making contributions for employees at the 3101 Euclid site.

I find for the reasons set forth immediately above and those set out in my findings with respect to "Unit A," that the Union has been, and is, the exclusive collective-bargaining representative of employees in "Unit B," which is an appropriate unit, for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that Respondent has, and continues to recognize it as such.

D. Are the Charging Parties Agents of the Union Within the Meaning of Section 2(13) of the Act?

General Counsel contends that the Charging Parties are agents of the Union within the meaning of Section 2(13) of the Act and the Respondent denies this relationship. Respondent acknowledges the principle that as part of an employer's 8(a)(5) obligation to bargain with a labor organization representing its employees, an employer has a duty to respond to the labor organization's request for relevant information. However, an employer does not owe such an obligation to provide information to entities other than a labor organization with which it has a duty to bargain.

As noted, Murphy is a Trustee of both funds as well as union officer. Murphy testified that both funds have an equal number of management and union representatives. The duties of trustees of both funds include reviewing collective-bargaining agreements, checking compliance therewith, approving audits and approving expenditures of funds. The Trustees for both funds derive their power to act from the trust documents in the collective-bargaining agreements. The Union negotiates those provisions of the collective-bargaining agreements which would require an employer to contribute to the pension and/or welfare fund. The administration of the funds is then delegated to the Trustees.

As noted, pursuant to the provisions of the janitorial agreement, the Respondent participated in both the welfare and pension funds.

With regard to the welfare fund, article XII reads in pertinent part:

Section 1. Signatory to Plan

The Employer, by becoming signatory to this agreement, agrees to be bound by the trust document establishing the Local No. 47 Welfare Fund No. 1 and the Employer further hereby agrees to abide by all the rules and regulations promulgated by the Trustees of said fund, not inconsistent with this agreement.

Section 4. Examination of Employer's Records

For any period of time not already audited by auditors for the Trustees of the Welfare Fund, said auditors shall be permitted to examine the Employer's payroll records, journals, general ledgers, tax returns as they may apply to payroll only, and any other business records required by the auditors to determine such Employer's compliance with the coverage, reporting and contributions provisions of this Agreement and of the welfare fund

Section 6. Collection Action

The Trustees of the welfare fund may take any action necessary and appropriate to enforce payment of the contribution, fees and expenses, costs and liquidated damages due from an Employer, including, but not limited to, proceedings at law and equity.

Identical provisions regarding the pension fund are found at article IX of the janitorial agreement.

Pursuant to the terms of the site agreement, the Respondent also agreed to be bound by the terms of the Pension Trust document. Likewise, with regard to the Respondent's employees covered by the Erieview agreement, the Respondent agrees to be bound by the terms of the Pension Trust document. The Pension Trust document itself makes reference to the collective-bargaining agreement. The document states that participating employers make contributions to the trust funds in such amounts as are specified in the collective-bargaining agreements.

The following language is found in the amendment to the pension plan dated September 2, 1979:

B. Examination of Employer's Records and Underpayment

B. Examination of Employer's Records and Underpayment of Contributions For any period of time not already audited by the Trust Fund's auditors, they shall be permitted to examine the Employer's payroll records, journals, general ledgers, tax returns as they may apply to the payroll only, and any other business records required by the auditors to determine such Employer's compliance with the coverage, reporting and contribution provisions of this pension plan. Such examination will be conducted by an accountant selected by the Trustees, and unless otherwise agreed in writing between the Trustees and an Employer, such examina-

tion will not be conducted more frequently than once a year.

The trust instrument for the welfare fund also references the collective-bargaining agreement. The following language is found at page 1 of the document:

That whereas the Union and the Employers have entered into a collective-bargaining agreement, which, in addition to the other provisions, establishes the Local No. 47 Welfare Fund No. 1 and provides that each Employer—signatory shall pay to such Fund, a sum of money as set forth in the current collective-bargaining agreement

. . . the said sums . . . are for the purpose of providing insurance and other benefits to those of its employees who are covered by the said Collective Bargaining Agreement

By letter dated April 8, 1987, Melvin Schwarzwald, in his capacity as attorney for the trustees of the pension plan and welfare fund, inquired whether CPS would submit to an audit. The letter was sent "in regard to the pending lawsuit which was brought by the pension plan and Welfare Fund" against Respondent. The stated purpose of an audit was "to let it be established if there are any further disputes between the parties." The letter was not sent directly to CPS, but to the attorney representing CPS in the Matonis suit. Respondent seems to question whether this is an information request and I hereby find that it is a proper request.

Respondent contends that the Trustees of the pension plan and welfare fund cannot, as a matter of law, be agents of Local 47 because of the role they play and the responsibilities they possess under both the Employment Retirement and Income Security Act of 1974, as amended, and Section 302(c)(5) of the Labor Management Reporting Act, as amended. It urges that such a finding is mandated by the holding of the Supreme Court in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

However, in *NLRB v. Teamsters Local 449*, 728 F.2d 80, 88 (2d Cir. 1984), the circuit court spoke to this issue:

This is not to say that pension trustees can never act as union agents and be subject to the Board's jurisdiction. That is a question implicitly left open by the *Amax* decision, and one that we do not reach today. In *Griffith Co.*, 660 F.2d at 410, the court said that action by the trustees may be attributed to the union in at least three factual situations:

1. Where provisions of a collective bargaining agreement remove the discretion to administer the trust funds solely for the benefit of the employees of the trust fund (*Turner Brooks*, 161 NLRB 229 (1966));

2. Where the trustees' actions were in fact directed by union officials (*Jacob Transfer, Inc.*, 227 NLRB 1231, 1232 (1977)); or

3. Where the trustees' acts were undertaken in their capacities as union officials rather than as trustees (*NLRB v. Construction & General Laborers' Union Local 1140*, 557 F.2d 16, 21 (8th Cir. 1981)).

See also *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 921, 931 (1984).

I find that the facts of the instant proceeding compels the finding that the Charging Parties are agents of the Union under both situations (1) and (2) set out above. The Union, as the collective-bargaining representative, has the duty to police the terms of the collective-bargaining agreement. The Union is charged with the responsibility of ensuring that its members receive benefits to which they are entitled. The Union has delegated certain of those responsibilities to the Trustees. Further, the Respondent acceded to that delegation. One of those delegated responsibilities is policing the collective-bargaining agreement to the extent that the Trustees must ensure that the Respondent makes proper contributions to the pension plan and welfare fund. The delegation of authority gives the Charging Parties the duty to periodically audit the Respondent's payroll and other specified records to achieve this end.

Further, I find that the language of the delegation of authority constitutes an ongoing express direction by the Union and its officials to periodically audit Respondent's records to ensure compliance with the terms of the collective-bargaining agreement and trust agreements. This delegation of authority and direction by the Union clearly does not contravene the teachings of the Supreme Court in *Amax*, supra at 2774, that "the trustees have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund.'"

In *L & M Carpet Contractors*, 218 NLRB 802 (1975), the Board concluded that "the trustees of a trust fund which has been provided for by the collective-bargaining agreement are agents of each of the parties to such agreement" where the trustees request an audit of a contributing employer's payroll records. Contrary to the urging of Respondent, I believe this case still to be valid precedent within the factual framework of the instant proceeding.

The Trustees were acting within the scope of their authority in seeking to audit the books of Respondent. As the parties agreed to permit the Trustees to administer the funds, the only method available to the Union to determine whether Respondent had fulfilled its obligations to union members, was to seek the assistance of the Trustees, its agents for this purpose. While the Trustees ability to act on behalf of the Union may be limited by contract, trust agreement, and their statutorily imposed fiduciary directions, they were clearly operating within that scope in this matter. I find for all the reasons set out above that the Charging Parties are agents of the Union within the meaning of Section 2(13) of the Act insofar as their specific actions in this proceeding are concerned.

E. Was the Charging Parties' Request for Information Necessary for and Relevant to the Union's Duties as the Collective-Bargaining Representative of Respondent's Employees?

General Counsel contends that the Charging Parties assertion of their contractual right and request to audit Respondent's payroll records for the purpose of determining which Respondent has made appropriate contributions to the Union's pension plan and welfare fund is necessary for, and relevant to, the Union's performance of its functions as the exclusive collective-bargaining representative of the units. General Counsel further contends that Respondent's refusal to permit Charging Parties to conduct such an audit con-

stitutes a violation of Section 8(a)(1) and (5) of the Act. Respondent denies the relevancy of the request.

As discussed above, the Trustees of the funds derive their power to act from the collective-bargaining agreement. Such responsibilities are delegated to the Trustees. One of their primary responsibilities is to ensure that participating employers make appropriate contributions to the funds. Murphy testified that employers who participate in the funds send in monthly contribution report forms to the administrative office of the appropriate fund. Those reports provide only an alphabetical listing of employees on whose behalf contributions are being made. The reporting forms do not identify at which accounts an employee may be working during the reporting period. Employer contributions to the fund are based on hours a particular employee works. The location at which an employee works will also determine the appropriate contribution as evidenced by the contracts as well as the letters modifying the janitorial agreement. Murphy's testimony establishes that the only way for the funds' Trustees to ascertain whether contributions reported are adequate for the hours worked is to audit an employer's payroll records.

The record clearly establishes that such audits have been conducted in the past. By letter dated July 15, 1985, Charles Drake, accountant for the Trustees, wrote to Respondent requesting access to Respondent's books for the purpose of conducting an audit to determine whether Respondent had complied with its contractual obligations regarding fund contributions. That audit would cover the periods July 1, 1983, through June 30, 1984, and July 1, 1984, through June 30, 1985. The Respondent agreed to permit the audit, as of course it was required to do by contract, and the audit began in September 1985.

Murphy testified that the audit described above was begun but was not completed. According to Murphy the audit was postponed because of ongoing settlement discussions between the parties concerning fund delinquencies. Those settlement discussions which were only partially successful, were concluded in the spring of 1987. As noted earlier, the site agreement was signed on March 27, 1987, as part of these settlement discussions. When Murphy wrote to Respondent requesting that the settlement agreement be signed by March 19, 1987, Patrick Cassesse, Respondent's president reminded Murphy, by letter dated March 13, 1987:

As you are well aware, we have been meeting for almost one year now in an effort to resolve all pending NLRB and court cases. Due to the complexity of these cases and the substantial amount of money involved, this process has required a significant effort on both our parts to determine the potential liability and explore possible solutions.

The settlement agreement has finally executed by the Union and the Respondent on March 27, 1987. The Union and the Respondent were not able to resolve all of their differences regarding arrearages in the pension and welfare fund. This is true despite the fact that such matters were often discussed during settlement negotiations.

By letter dated April 8, 1987, Melvin Schwarzwald, counsel for the Union and Fund Trustees, wrote to Respondent's then counsel, enclosing documents to complete the implementation of the settlement agreement. The letter went on to

request that the Trustees be permitted to audit the Respondent's books to establish whether there were any further disputes between the parties. The audit was requested through June 30, 1986, but "preferably up to date." Finally the letter requested that Respondent's attorney contact Schwarzwald concerning the audit as well as any settlement possibilities.

Respondent has refused to permit the Trustees to audit any of its books or records. Cassesse testified that Respondent refused to permit the audit because he felt that the Trustees would look far beyond whatever scope of responsibility they had. However, it should be noted that Cassesse never offered to turn over any books or records to be audited nor was he willing to discuss seriously possible limitations on the audit to allay his fears.

The Trustees, as agents for the Union, sought information from Respondent in order to determine whether unit employees were receiving appropriate benefit contributions. The record establishes that the Trustees could only secure this information through an audit, the same procedure used in the past.

It is well settled that, on request, an employer has a duty to provide the union with information which is relevant to the union in carrying out its statutory duties and responsibilities. An employer's refusal to furnish a union information which is relevant to the Union's proper performance of its collective-bargaining responsibilities is an unfair labor practice under the Act. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-154 (1956).

The sole criterion for determining whether information must be produced is its relevance or reasonable necessity for the Union's proper performance of its representative role. Where the information requested concerns wage rates, job description, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. *Pfizer, Inc.*, 268 NLRB 916 (1984); *Boeing Co.*, 182 NLRB 421, 425 (1970); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enfd.* 347 F.2d 61, 69 (3d Cir. 1965); *Timken Roller Bearing Co.*, 138 NLRB 15 (1962) *enfd.* 325 F.2d 746, 750 (6th Cir. 1963), *cert. denied* 376 U.S. 971 (1964).

It is clear that the information sought herein is presumptively relevant. The Union has the duty to monitor or police the collective-bargaining agreement and the trust agreements created therein. The Union, through its agents, is seeking information to determine whether Respondent has properly contributed to the benefit plan of unit employees. Respondent admittedly has participated in both funds during the relevant time periods and continues to participate in the pension fund to date. Respondent has agreed to undertake an obligation to contribute to these funds on behalf of bargaining unit employees. The Union represents those employees. The Union, through its agents, seeks to determine whether Respondent has fulfilled its obligation to unit members. The only way to determine this is through an audit of its records. Respondent has permitted such audits, as it is obliged to do, in the past. Respondent's refusal to do so now amounts to a violation of Section 8(a)(1) and (5) of the Act.

F. Is the Charging Parties Action Barred by Section 10(b) of the Act?

In its amended answer, Respondent contends that the unfair labor practice charges alleged in the complaint are barred by Section 10(b) of the Act. As noted earlier, the request for information occurred on April 18, 1987. The instant charge was filed on October 7, 1987. Respondent has never responded to the Union's information request. Therefore, both the request for, and the refusal to, provide information occurred within the period permitted under Section 10(b) of the Act. While the information which is sought may have been generated more than 6 months prior to the filing of the charge, both the request for the information and Respondent's refusal to provide that information occurred within 6 months of the time the charge was filed.

Respondent argues that prior requests for some of the information sought herein. The last such request prior to the instant one was made by letter dated July 15, 1985, from the Trustee's accountant to Respondent. This audit was allowed by CPS and begun. However, at some unidentified point thereafter, CPS considered the audit complete and evidently refused to let it proceed further though the Union and the Trustees' consider this audit incomplete. The period covered by this audit was July 1, 1983, through June 30, 1985. Murphy testified that the audit was not completed because of settlement discussions between the parties. As soon as those settlement discussions were completed, and no resolution achieved with I regard to the potential delinquencies at issue, the Charging Parties requested the information at issue herein. I disagree. Clearly, if the Trustees considered the 1985 audit incomplete, Respondent's refusal to allow its completion would have given rise to an unfair labor practice charge as did its 1987 refusal. The Trustees have chosen to seek remedy for the earlier refusal in Federal court, but could have also sought relief from the Board. They did not and I find that their request to audit Respondent's books for the period July 1, 1983, through June 30, 1985, is barred by Section 10(b) of the Act.

I find that the instant unfair labor practices are not barred by Section 10(b) of the Act nor does that Section operate to limit the Charging Parties' access to Respondent's books to a period of time 6 months before the charge was filed. The audit request validly seeks to audit records back to July 1, 1985, the first date beyond the scope of the incomplete audit. Because of litigation and prolonged settlement discussions, no interim audit was requested and under the circumstances, the failure to request an audit prior to April 1987 is reasonable.

G. Have the Charging Parties Waived Their Right to an Audit?

Respondent contends that, if the Charging Parties are agents of the Union, the Union has waived its and their right to compel an audit of Respondent's books. The Respondent reasons that the settlement agreement entered into between the Union and Respondent on March 27, 1987, includes a provision that the parties agree not to file an unfair labor practice charge on any issue which was raised, or could have been raised, in any prior unfair labor practice proceeding. That agreement reads, in pertinent part:

such proscription against refiling shall be limited to unfair labor practice charges which relate to conduct occurring prior to the execution of this agreement

According to Respondent, the Union thereby clearly and unmistakably waived its right to request information by way of the April 1987 letter. I disagree. Respondent had not refused the Charging Parties access to its books until April 1987, after the settlement was signed. Thus the action by Respondent which gives rise to the instant proceeding did not occur prior to the execution of the settlement agreement. Moreover, the parties understood at the time the settlement agreement was signed that it did not resolve all matters in dispute, and the potential arrearages not resolved would be dealt with in a separate fashion. I cannot find that the Union or the Trustees should be charged with the knowledge that Respondent would refuse to allow an audit from the ending date of the last one (June 30, 1985).

Respondent also argues that the Union is barred from obtaining the requested information by the terms of a 1980 settlement agreement between the Trustees and Respondent. Paragraph 3 of the agreement states in pertinent part:

3. It is further agreed that audits . . . shall be conducted expeditiously.

While the April 1987 audit request involves a period of time from 1983² to the present, this fact cannot be viewed in isolation. The entire question of potential arrearages, including audits, became involved in extensive settlement negotiations between the parties. Those negotiations included proposals to settle all arrearages or anticipated arrearages in fund contributions, thus obviating the need for an audit. Settlement discussions concluded in March 1987 with no solution regarding all arrearages. The final documents to effectuate that agreement were transmitted to Respondent on April 8, 1987. In that same letter, the request for information was made. Such request must be considered, by any definition, to be expeditious. The Union has not, therefore, failed to assert its right for an unreasonable or an unexplained length of time.

I find therefore, that the Charging Parties, as agents of the Union, are not barred from obtaining the requested information by virtue of Respondent's claimed waiver or by the doctrine of laches and/or estoppel.

CONCLUSIONS OF LAW

1. Respondent, Commercial Property Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Service, Hospital, Nursing Home and Public Employees Union, Local 47, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Parties, Building Service Local 47 Cleaning Contractors Pension Plan and its Trustees and Local 47

Welfare Fund No. 1 and its Trustees, are agents of the Union within the meaning of Section 2(13) of the Act.

4. The following employees of Respondent, designated herein as "Unit A," "Unit B," and "Unit C," constitute units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

"Unit A"

All of Respondent's employees engaged in janitorial work at sites not covered by site agreements, excluding any such employees working fifteen hours or less in an account where only one employee is engaged, if such account is not owned or operated by an entity which operates in more than one location serviced by the employer, excluding also office clerical employees and supervisors as defined in the Act.

"Unit B"

All of Respondent's regular employees engaged in janitorial work at the Ohio Savings Plaza, Penton Plaza, Caxton, 3101 Euclid, One Playhouse, and 666 Euclid Buildings in Cleveland, Ohio, excluding any such employees working fifteen hours or less in an account where only one employee is engaged, office employees and supervisors as defined in the Act.

"Unit C"

All of Respondent's regular employees employed as freight operators, janitors, day matrons, cleaners and dock attendants at Erieview Plaza Building, excluding any such employees working fifteen hours or less per week, office employees, guards and supervisors as defined in the Act, and employees employed by the Employer at any other building.

5. The Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by refusing to allow, on proper request, an audit of its payroll records for the period July 1, 1985, to the present for the purpose of determining whether Respondent has made appropriate contributions to the Union's pension plan and welfare fund No. 1. for Respondent's employees in the units set out above.

6. The information requested by the Charging Parties, as agents for the Union, is information necessary for, and relevant to, the Union's performance of its functions as the exclusive collective-bargaining representative of the units set out above.

7. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, it is recommended that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

²I have found the request to be barred by Sec. 10(b) of the Act insofar as it seeks an audit of Respondent's books for a period of time prior to June 30, 1985.

Specifically, it is recommended that Respondent be ordered to furnish the Charging Parties the information requested on or about April 18, 1987, permitting the Charging Parties to audit Respondent's payroll records for its employees in "Units A, B, and C," as described herein, for the pe-

riod July 1, 1985, to the present for the purpose of determining whether Respondent has made appropriate contributions to the Union's pension plan and Welfare Fund No. 1.

[Recommended Order omitted from publication.]